

## CHAPTER 4 CONTESTED CASES

[Prior to 1/13/88, see Civil Rights 240—1.5(2), 1.5(3), 1.8 to 1.15, 1.18]

### **161—4.1(216) Contested case hearing.**

**4.1(1) *Notice of hearing.*** Where conciliation efforts fail, the executive director, with the approval of a commissioner, shall serve upon the parties notice of an administrative hearing on the merits of a complaint.

**4.1(2) *Content of notice.*** Notice given under this rule shall specify all original and amended charges of the complaint, and shall require the respondent to answer at hearing.

### **161—4.2(216) Conducting the hearing.**

**4.2(1) *Scheduling.*** After the executive director has issued notice of an administrative hearing, the director may designate a staff member to attend the scheduling of the hearing.

**4.2(2) *Notice.*** At least 20 days prior to the scheduled date of a public hearing, the commission staff shall cause to be served upon the respondent a notice that a public hearing will be held relative to the complaint and stating its time, date, and location.

Subsequent to issuance of the notice of hearing, the office of the attorney general and counsel for the parties and the parties may employ prehearing discovery measures set forth in Iowa Code chapter 17A. Prehearing discovery measures must be completed within a reasonable time prior to the hearing date, so it will not be necessary to postpone or reschedule the hearing.

**4.2(3) *Hearing officers.*** The chairperson of the commission shall designate three members of the commission, or an administrative hearing officer, to conduct the hearing. The absence or disqualification of one or more members of a hearing panel appointed to hear a particular case shall not prevent the remaining panel members from hearing the case as independent hearing commissioners, unless good cause can be shown that would prevent the individual commissioner(s) from acting as independent hearing commissioner(s).

**4.2(4) *Disqualification.*** Persons who have any interest in the case at issue, or personally know the complainant or respondent, shall disqualify themselves to serve as a hearing examiner. The investigating commissioner in the case at issue shall not be appointed to serve as a hearing commissioner.

**4.2(5) *Power of the hearing officers.*** The hearing officer shall have full authority to make all decisions regarding the admission and exclusion of evidence, to control the procedures, and to rule upon all objections and motions. Except in extraordinary circumstances, evidence or testimony offered by any party shall be entered in the record subject to the objection of any party, in order that a complete record will be available in the event of appeal.

*a.* Continuance of contested case hearings or submission deadlines in contested case hearings.

(1) Applications for continuance shall be filed without delay after the grounds become known to the party or the party's counsel.

(2) A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the hearing officer that substantial justice will be more nearly obtained. It shall be allowed if the parties agree and the hearing officer approves. The hearing officer is not bound by the agreement of the parties, and may modify the agreement or reject the agreement if, in the judgment of the hearing officer, justice will be more nearly served. Failure of a party to timely obtain counsel, after clear and adequate notice of the right to be represented by an attorney will not be considered grounds for a continuance to allow time to obtain counsel.

(3) All applications based on absence of evidence, if required to be in writing, must be supported by affidavit of the party, an agent of the party, or the professional statement of the party's attorney, and must show the name and residence of the absent witness, or if unknown, the affiant has used diligence to ascertain them; what efforts, constituting due diligence, have been made to obtain the witness or the testimony of the witness, and facts showing reasonable grounds to believe the testimony will be procured in the future, and stating when the witness will be available; what particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that they believe them to be true and

know of no other witness by whom they can be fully proved. If the hearing officer finds the motion sufficient, the adverse party may avoid the continuance by admitting that the witness, if present, would testify to the facts stated, as the evidence of the witness.

(4) The adverse party may at once, or within any reasonable time the hearing officer allows, file specific written objections to the application for continuance, which shall be part of the record.

(5) Oral applications for continuance will only be allowed when the other party, the agent for the other party, or the other party's attorney have been notified, and when the hearing officer is satisfied that there is no time for a written application, the lateness of the application was not caused by undue delay or lack of diligence by the applicant. If the application for continuance is oral, the resistance may be oral, but both must be committed to writing for the record.

b. Reserved.

#### **161—4.3(216) Contested case motions.**

**4.3(1)** Motions for procedural rulings or relief shall be in writing, shall set forth the ruling or relief sought and shall state the grounds and the statutory or other authority relied on, except that motions made during hearing may be stated orally upon the record.

**4.3(2)** The moving party shall file the motion with the hearing officer appointed to hear the case. Where no hearing officer has been appointed to hear the case, the compliance director shall assign the motion to the hearing officer designated to issue cause decisions for disposition.

**4.3(3)** The moving party shall file a copy of the motion with all other parties to the complaint.

**4.3(4)** All nonmoving parties shall have an opportunity to promptly resist the motion.

**4.3(5)** All replies to motions shall be in writing and filed with the compliance director or hearing officer, whichever is appropriate.

**4.3(6)** A copy of the reply shall be filed with all other parties to the complaint.

**4.3(7)** The parties may be allowed a procedural hearing at the discretion of the hearing officer, if it can be shown that the questions cannot be adequately addressed in writing, and that fairness requires a hearing.

**4.3(8)** All procedural hearings shall be held in Des Moines, Iowa, or by telephone conference call, unless the hearing officer determines that fairness requires that the conference be held in person elsewhere. A record of arguments will not be kept unless requested by either party. A record may be a tape recording or by certified shorthand reporter, at the discretion of the hearing officer.

**4.3(9)** Prehearing conference. At the discretion of the hearing officer, or by request of counsel for one or more parties, a prehearing conference may be held in person in Des Moines, Iowa, or by telephone conference call, unless the hearing officer determines that fairness requires that the conference be held in person elsewhere. A conference outside of Des Moines is to be held only in exceptional circumstances. A record of hearing will not be kept unless requested by either party. The record may be by tape recording or by certified shorthand reporter, at the discretion of the hearing officer. The conference will include anticipated issues for the complainant, defenses for the respondent, jurisdictional issues, exhibits, witnesses, discovery, and stipulations of fact or of law.

**4.3(10)** Briefs. The hearing officer may require that written briefs be submitted on behalf of the respondent and on behalf of the complainant.

**4.3(11)** Sworn testimony. All testimony given at a commission hearing shall be under oath administered by the court reporter present at the hearing.

**4.3(12)** Order of presentation. The case in support of the complaint shall be presented to the hearing officer by one of the commission's attorneys, or by the attorney for the complainant, who shall present complainant's evidence first. When there is more than one complaining party the order of presentation shall be in the discretion of the hearing officer. After all the evidence and testimony of the complainant parties has been received, all other parties shall be allowed to present their evidence or testimony. All parties shall be allowed to cross-examine any witness immediately after their testimony has been received.

**4.3(13)** Stipulations. The parties may, by stipulation in writing filed with the commission at any stage of the proceeding or orally made at the hearing, agree upon any pertinent facts in the proceeding.

**4.3(14)** No testimony or evidence shall be offered or received at any hearing concerning offers or counteroffers of adjustment during efforts to conciliate an alleged unlawful discriminatory practice, except that evidence presented by respondent of offers or counteroffers shall constitute a waiver of the provisions of this subrule.

**4.3(15)** Any objection not duly made before the hearing officer shall be deemed waived.

**4.3(16)** When objections to the admission or exclusion of evidence are made, the grounds relied upon shall be stated briefly.

**4.3(17)** If a party intends to introduce expert testimony at the hearing, notice shall be provided the opposing party and the hearing officer as to the identity of the expert and the subjects upon which the expert shall testify. Notice shall be provided no later than ten days prior to the hearing.

**4.3(18)** Transcript and record. All testimony given at hearing held pursuant to Iowa Code chapter 216, shall be transcribed by a certified court reporter retained by the commission. The record in a contested case before the hearing officer shall consist of the notice of the hearing, the verified complaint as it may have been amended, the certified transcript of the testimony taken at the hearing, the exhibits and depositions in evidence, written applications and stipulations.

**161—4.4(216) Authorized ex parte communication.** Unless required for the disposition of ex parte matters specifically authorized by statute, the hearing officer shall not communicate directly or indirectly with any person or party, nor shall any person or party communicate directly or indirectly with the hearing officer, concerning any issues of fact or law in a contested case unless:

**4.4(1)** Each party or their representatives is given written notice of the communication. The notice shall contain a summary of the communication, if oral, or a copy of the communication if written, and the time, place and means of the communication.

**4.4(2)** After notice all parties shall have the right, upon written demand, to respond to the communication, including the right to be present and heard if the communication is oral and has not taken place. If the communication is not written or if oral and completed, any other person has the additional right to a special hearing for the purpose of responding to the ex parte communication.

**161—4.5(216) Inclusion in the record.** Any ex parte communication prohibited by Iowa Code section 17A.17(2) received by a hearing officer shall be included in the record. If the prohibited ex parte communication is received orally, the hearing officer shall summarize the communication and include it in the record. Any party to the contested case shall be immediately notified of the communication and given a reasonable opportunity to respond, including if necessary, a special hearing.

**4.5(1) Penalty for ex parte communication.** The commission may censure, suspend or revoke the privilege of practicing before it of any person making an ex parte communication to a hearing officer if the person knows or reasonably should know that the ex parte communication is in violation of the provisions of Iowa Code section 17A.17(2).

**4.5(2) Hearing officer penalty.** The commission may censure, suspend or dismiss any hearing officer who fails to include in the record an ex parte communication prohibited by Iowa Code section 17A.17(2).

**4.5(3) Procedure for determination of penalty.** The censure of a person or the suspension or revocation of a person's right to practice before the commission due to an alleged violation of the prohibition against ex parte communication shall constitute a contested case as that term is defined in Iowa Code section 17A.2, and no person shall be censured or have the right to practice before the commission suspended or revoked without notice and an opportunity to be heard as provided in Iowa Code chapter 17A.

**161—4.6(216) Findings and order.**

**4.6(1) Recommended decision.** After a review of the transcript, the evidence, and the briefs, the hearing officer shall issue in writing findings of fact, conclusions of law, and a proposed order, as the recommended decision to the commission for its adoption, modification, or rejection.

**4.6(2) Notification.** Upon receipt of the hearing officer's recommended decision the commission shall forward a copy of the hearing officer's recommended decision to each of the parties. The commission shall include with the hearing officer's recommended decision notice of the date, time, and place of the meeting at which the commission shall review the recommended decision. The notice shall also advise the parties that if they desire to take exceptions to or appeal the recommended decision they must file the exceptions or appeal with the commission and that they may file an appeal brief or brief in support of the exceptions. The appeal or exceptions and appeal brief or brief in support of exceptions must be filed with the commission no later than 15 calendar days prior to the commission meeting at which the decision will be reviewed. The parties shall be afforded no less than 15 calendar days between the date the hearing officer's recommended decision is mailed to the parties and the date the appeal or exceptions and appeal brief or brief in support of exceptions must be filed with the commission.

For the purpose of this subrule "file(d) with the commission" shall mean receipt of the appeal or exceptions and appeal brief or brief in support of exceptions (if any), by the commission at its office in Des Moines.

**4.6(3) Motion for oral argument.** The commission on its own motion may, whenever justice requires, request the parties in a contested case proceeding present oral argument to the commission prior to review of the recommended decision of the hearing officer.

Any party may request an opportunity to present oral argument to the commission prior to the review of the recommended decision of the hearing officer. Notice of requests shall be given to all parties.

**4.6(4) Time limit for request for oral argument.** A request for oral argument pursuant to subrule 4.6(3), shall be in writing stating the reasons in support thereof and shall be filed with the commission no later than 15 calendar days prior to the commission meeting at which the decision is scheduled for review.

**4.6(5) Response of parties.** All parties shall be afforded an opportunity to respond to the request for oral argument in writing. Response shall be filed with the commission no later than three calendar days prior to the commission meeting at which the decision is scheduled for review.

**4.6(6) Commission action on request for oral argument.** The commission may grant or deny a request for oral argument. If the request is granted, the review of the hearing officer's recommended decision shall be postponed until after oral arguments have been heard. If the request is denied, the commission shall proceed with the review of the recommended decision as scheduled.

The commission shall issue an order either granting or denying request for oral argument. If the commission grants oral argument, the order shall state the date, time and place of the meeting at which oral arguments are to be heard and shall be mailed by certified mail to the parties' last-known mailing address.

**4.6(7) Commission review.** The commission shall within 120 days of the date it receives the recommended decision of the hearing officer review the decision at a commission meeting. The commission shall consider all timely filed appeals, exceptions and briefs at the time it reviews the recommended decision. The commission may adopt, modify or reject the hearing officer's recommended decision or it may remand the case to the hearing officer for the taking of additional evidence and the making of further recommended findings of fact, conclusions of law, decision, and order the commission deems necessary. Upon completing its review of the hearing officer's recommended decision the commission shall cause to have issued the appropriate order.

**4.6(8) Final order.** If the commission fails to issue an order within 120 days from the date the administrative hearing officer submits recommendations, the recommended findings and order shall become final.

**4.6(9) Content of orders.** Orders of the commission shall seek to remedy an injury in accordance with the intent of Iowa Code chapter 216.

**4.6(10) Hearing—other reasons.** At any other time, the commission, executive director or designee may, in its discretion, convene a hearing: whenever a problem of discrimination arises; in order to expedite the disposition of preliminary matters in any action before it; or when in the judgment of the commission, executive director or designee, the circumstances warrant.

**161—4.7(216) Assessment of costs of hearing.**

**4.7(1) General rule.** If the complainant or the commission prevails in the hearing, the respondent shall pay the “contested case costs” incurred by the commission. If the respondent prevails in the hearing, the commission shall itself bear the “contested case costs” incurred by the commission.

**4.7(2) Mixed results.** Where the complainant or commission is successful as to part of the remedies sought at the hearing and unsuccessful as to part of the remedies, the administrative law judge may recommend an equitable apportionment of “contested case costs” between the commission and the respondent.

**4.7(3) Costs allowable.** The following “contested case costs” and no others will be assessed or apportioned as provided in subrule 4.7(1) or 4.7(2):

- a. The daily charge of the court reporter for attending and transcribing the hearing.
- b. All mileage charges of the court reporter for traveling to and from the hearing.
- c. All travel time charges of the court reporter for traveling to and from the hearing.
- d. The cost of the original of the transcripts of the hearing.
- e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

**4.7(4) Remedial orders.** This rule does not affect those costs which may be recoverable under Iowa Code section 216.15(8) “a”(8).

**161—4.8(216) Appeals to the district court.** Appeals to the district courts from the decision of the commission shall be perfected pursuant to the provisions of Iowa Code section 216.17 and Iowa Code chapter 17A.

These rules are intended to implement Iowa Code chapter 216.

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## CHAPTER 5

### DISCRIMINATION IN AIDING/ABETTING AND RETALIATION

Reserved

\*The Administrative Rules Review Committee at its May 21, 1979, meeting delayed the effective date of 240—subrules 1.1(7) to 1.1(9), 1.3(1), 1.8(2) and rules 1.16 and 1.17 70 days.